Supreme Court, U.S.
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No. 85-1889

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

JACK ZACHARY, et al.,

Petitioners,

vs.

ALLAN WILK, ROYAL PALMS MOBILE HOME PARK, LTD., a California Limited Partnership,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT,
STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Public Law 280, 28 U.S.C. § 1360, authorize application of the legislative acts of political subdivisions of a state (in this instance, of a municipality) on Indian lands?

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STATEMENT OF THE CASE

In March of 1983 the voters of the City of Cathedral City enacted by initiative measure a local rent control ordinance. Clerk's Transcript (hereinafter "CT") at 10. Prior to the election the City Attorney prepared and published an "Impartial Analysis" of the proposed legislation concluding that any attempt to apply the

proposed ordinance on Indian lands "would be contrary to Federal Law and therefore invalid." CT at 162-63.

After passage of the rent control initiative, the Petitioners, all individual residents of rental property located on Indian land, commenced this action to require their landlord, Respondents here, to comply with the local ordinance. Significantly, their complaint named neither the City of Cathedral City nor the Indian lessors of the land as parties. CT at 1. Prior to the hearing of Petitioners' motion for preliminary injunction, the affected Indians, the Agua Caliente Band of Cahuilla Indians, filed a declaration opposing application of the City's ordinance on their lands. CT at 237-39. The City elected not to appear or to be heard. While Petitioners' trial court pleading ploy enables them to argue that the dispute is between non-Indian tenants and a non-Indian landlord, such argument is irrelevant to the question whether a city ordinance can be applied on Indian lands.

There has been no trial in the state court. Rather, the Petition seeks review of a successful appeal from the granting of a preliminary injunction. Petitioners' Appendix (hereinafter "Pet. App.") at 8a-12a. The effect of the decision of the California District Court of Appeal is to dissolve the preliminary injunction and remand the matter for a trial on the merits. Pet. App. at 35a.

REASONS FOR DENYING THE WRIT

I. THERE HAS BEEN NO FINAL JUDGMENT IN THE STATE COURT.

The decision of the court of appeal reversed the granting of a preliminary injunction. There has been no final trial

court judgment on any of the many issues (*see* Pet. App. at 7a) raised by Petitioners' complaint.

It has been a "salutary and long-standing rule" of this Court that the granting or denial of a preliminary injunction by the state court is not deemed a final judgment. *Construction Laborers v. Curry*, 371 U.S. 542, 552 (1963). An exception to this rule exists where the decision below decides the merits of the case such that it disposes of the case finally as a practical matter. *Id.* at 550-51.

The California District Court of Appeal here held that the ordinance cannot be enforced on Indian land. Pet. App. at 23a. This determination is now, admittedly, final. It also observed, however, that it did not intend to rule "that no local regulation may ever be enforced in regard to any activity on Indian property." Pet. App. at fn. 2, pp. 23a-24a. It recognized that the Secretary of the Interior was authorized to make local regulations applicable to Indian land, but found that the record on appeal revealed no action by the Secretary as to the particular ordinance in question. *Id.*

This observation underscores the impracticality of a finality determination here. The Petitioners' cleverly pleaded complaint frustrated the opportunity of both the City and the Indians to be heard. The motion for preliminary injunction forced a decision based upon "probability of success" without the full record which would have been available to the court after trial. Not only does the record on appeal fail to reveal the position of the Secretary of Interior, it does not even contain the complete leases with the Indian lessors.[1]

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[1] The United States District Court that also considered this ordinance interpreted Section 2.C thereof, after a full trial, to exempt from its

The circumstances of this case do not warrant exception to the general rule that a state court denial of a preliminary injunction is not a "final judgment" subject to review by this Court.

II. THE STATE COURT DID NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT OR THE FEDERAL COURT OF APPEAL.

Petitioners assert there are two questions presented for review. However, both questions challenge the single conclusion of the California District Court of Appeal that "*local* regulations such as the Ordinance cannot be applied to or enforced on Indian lands." Pet. App. at 14a. Respondents therefore address the single issue for which review is sought. There are two points to be made.

First, because Petitioners misconstrue the decision below, they fail to recognize that the decisions of this Court upon which the Petition relies are not "applicable" to the holding below.

Public Law 280, 28 U.S.C. § 1360, quoted in full in the Petition at 6-7 is at the heart of the issue. Subsection (a) thereof grants certain states, including California, a limited exemption from the general rule of exclusively Federal jurisdiction over Indian lands. Subsection (b) further limits

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(Continued)
application month-to-month tenancies resulting from holding-over after expiration of leases. Pet. App. at 93a-96a. The state trial court did not have sufficient facts before it to consider this adequate, non-federal basis for decision.

this exemption by prohibiting both the taxation of Indian lands and state regulation inconsistent with Federal law.

Each of the decisions of this Court cited and relied upon by Petitioners concern, not the granting provision of Subsection (a), but the limiting provisions of Subsection (b). *Rice v. Rehner*, 463 U.S. 713 (1983) (state regulation of sale and distribution of alcoholic beverages on Indian reservation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (state regulation of hunting and fishing on Indian reservation); *Montana v. United States*, 450 U.S. 544 (1981) (state regulation of hunting and fishing on Indian reservation); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) (state motor carrier license and use fuel taxes); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (various state sales and excise taxes); *Bryan v. Itasca County*, 426 U.S. 373 (1976) (state personal property tax); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976) (state cigarette sales and personal property taxes); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) (state personal income tax).

By contrast, the sole issue addressed by the state appellate court was the scope and intent of the limited grant of civil jurisdiction found in Subsection (a). Since none of Petitioners' cases address this issue, the decision below cannot conflict with those decisions.

The issue of the scope of Public Law 280(a) is, however, the subject of Federal regulations that prohibit legislation of political subdivisions of the State of California "limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property" of Indians. *See* 25 C.F.R. § 1.4 (June 1965) and 30 Fed. Reg. 8722 (July 1965) set forth in Respondents' Appendix at A-1

-A-3. As these regulations reflect, it has long been the position of the Department of Interior that local regulation of Indian lands is prohibited except as specifically authorized by the Secretary of the Interior. *City of Sault Ste. Marie, Mich. v. Andrus*, 532 F. Supp. 157, 165 (D.C. 1980).

Subsection (a) has also been authoritatively interpreted on two occasions by the Ninth Circuit Court of Appeals. *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); *United States v. County of Humboldt*, 615 F.2d 1260 (9th Cir. 1980). In both instances the Circuit Court held that Public Law 280(a) did not grant local governments legislative jurisdiction over Indian lands. The California District Court of Appeal specifically followed these precedents. Pet. App. at 19a-23a. In doing so it also relied, in part, on its observation that this Court had cited *Santa Rosa* with approval in *Bryan v. Itasca County*, 426 U.S. 373, 388 (1976) ("nothing in [the] legislative history [of Public Law 280] remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations' "). Pet. App. at 21a-22a.

Second, recognizing, perhaps, that there is no conflict with prior decisions, Petitioners seem also to argue that this Court should now consider and overrule *Santa Rosa* and *Humboldt* because the rule they announce "wreaks havoc" in the administration of municipal police powers. (*See, e.g.*, Petition at 8-9.)

This "havoc" argument was also considered and rejected in *Santa Rosa*. The court there observed that its ruling

could result in "some abrasion" between local jurisdictions and Indian tribes with differing views on "the relative priority of economic development, environmental amenity, public morals, and the like." 532 F.2d at 664 (footnote omitted). It did not, however, feel this required eliminating Indian jurisdiction:

> when such conflicts involve a matter in which the state has a sufficient stake or interest to legislate, the state may, subject to the limitations of § 1360(b), pass a law of statewide application resolving the matter. And if the state is unable to act alone, it may seek Federal cooperation.
>
> 532 F.2d at 664.

The state court decision did follow all applicable Federal precedent. In doing so, it vacated a preliminary injunction, the effect of which had been significantly to reduce the rental income of the affected Indian lessors pending a full trial of the issues presented. The state court decision was, then, correct in all respects.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Dated: June 13, 1986.

Respectfully submitted,

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APPENDIX A

25 C.F.R. § 1.4

§ 1.4 State and local regulation of the use of Indian property.

(a) Except as provided in paragraph (b) of this section, none of the laws, ordinances, codes, resolutions, rules or other regulations of any State of political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

(b) The Secretary of the Interior or his authorized representative may in specific cases or in specific geographic areas adopt or make applicable to Indian lands all or any part of such laws, ordinances, codes, resolutions, rules or other regulations referred to in paragraph (a) of this section as he shall determine to be in the best interest of the Indian owner or owners in achieving the highest and best use of such property. In determining whether, or to what extent, such laws, ordinances, codes, resolutions, rules or other regulations shall be adopted or made applicable, the Secretary or his authorized representative may consult with the Indian owner or owners and may consider the use of, and restrictions or limitations on the use of, other property in the vicinity, and such other factors as he shall deem appropriate.

[30 FR 7520, June 9, 1965]

30 Fed. Reg. 8722

NOTICES

Office of the Secretary

INDIAN PROPERTY IN CALIFORNIA

Adoption and Application of State Laws

Pursuant to § 1.4(b), Title 25, Code of Federal Regulations (30 F.R. 7520), the Secretary of the Interior does hereby adopt and make appalicable, subject to the conditions hereinafter provided, all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States and located within the State of California. This adoption and application does not include the laws, ordinances, codes, resolutions, rules or other regulations of the various counties and cities within the State of California which will be adopted and applied by separate action with such exceptions as are determined to be appropriate.

Nothing contained in this notice shall be construed to in any way alter or limit the provisions of sections 2(b) and 4(b) and (c) of the Act of August 15, 1953 (67 Stat. 588).

Nothing contained in this notice shall be construed to in any way alter, limit, or abridge any vested rights to real or

personal property, including water rights, belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.

The Secretary of the Interior may by appropriate notice expressly revoke the adoption and application of any such laws, ordinances, codes, resolutions, rules or other regulations if he determines such revocation to be in the best interests of the Indian owner or owners in achieving the highest and best use of such property.

John A. Carver, Jr.
Under Secretary
of the Interior.

July 2, 1965.

[F.R. Doc. 65-7193; Filed, July 8, 1965; 8:47 a.m.]